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In the Supreme Court of the United States

OCTOBER TERM, 1977

BRUCE JOHN BAKER and JOHN STEPHEN BRYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JEROME M. FEIT,
JOHN VOORHEES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 567 F. 2d 924. The opinion of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1978. A petition for rehearing was denied on March 6, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on April 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of a footlocker taken from the trunk of petitioners' car following their arrest violated the Fourth Amendment.

2. Whether the affidavit submitted in support of the search warrant for petitioners' automobile contained a material omission that invalidated the search.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of California, petitioners were convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner Baker was sentenced to concurrent terms of five years' imprisonment, to be followed by three years' special parole, on each count; petitioner Bryan was sentenced to concurrent terms of five years' imprisonment, to be followed by three years' special parole, on each count. The court of appeals affirmed (Pet. App. i-x).

Petitioners moved before trial to suppress the cocaine that was seized, pursuant to a search warrant, during the search of a footlocker that had been found in the trunk of the automobile in which they were arrested. The evidence showed that at about 12:30 p.m. on August 17, 1976, Agent Alvah Henley of the Drug Enforcement Administration and Officer Barry Bergman of the Foster City, California, Police Department, who were both working in an undercover capacity, met with co-conspirators Jeffrey Wardley and Ronald O'Donnell at the Winery Restaurant in Foster City for the purpose of purchasing an ounce of cocaine (Pet. App. ii; S. Tr. 13; Tr. 371-372).[1] O'Donnell and Agent Henley went to the

[1]"S. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript.

restaurant parking lot, where O'Donnell removed 27 grams of cocaine from a blue flight bag in the rear seat of his car and sold the drugs to the agent for $1,770 in marked funds. After the two men had returned to the restaurant, O'Donnell informed the agents that an additional four pounds of cocaine were available from his source, "Debbie," in Palo Alto (Pet. App. ii; S. Tr. 14, 16; Tr. 381, 376). After making several telephone calls to "Debbie," O'Donnell offered to drive to Palo Alto to obtain a sample of the cocaine (S. Tr. 16-17). O'Donnell returned to the restaurant at about 4:20 p.m. and showed the sample to Agent Henley. Following further negotiations, it was agreed that "Debbie" and two other persons would transport all of the cocaine to Foster City and that the agents would purchase it from O'Donnell one-half pound at a time (Pet. App. xii; S. Tr. 20; Tr. 341).

At approximately 7:10 p.m., O'Donnell left the restaurant to meet with "Debbie" (S. Tr. 22; Tr. 391). D.E.A. agents observed O'Donnell, co-conspirator Deborah Sears and petitioner Baker walk across the parking lot behind the restaurant and enter O'Donnell's automobile (Pet. App. iii; S. Tr. 143). Shortly thereafter, petitioner Baker got out of the car, walked back across the parking lot, and disappeared behind the restaurant. A few minutes later, petitioner Baker returned to the car and placed a blue flight bag in the trunk (S. Tr. 143-144).

At 7:45 p.m., petitioner Bryan drove into a lot and parked facing O'Donnell's car. Sears and petitioner Baker joined petitioner Bryan in his car, while O'Donnell went inside the restaurant to tell Agent Henley that the cocaine had arrived (S. Tr. 144-145). O'Donnell then led the agent to the trunk of his car and removed a plastic bag containing a half pound of cocaine from the blue flight bag. At this point O'Donnell was arrested. Agent Henley then signalled the other agents, who arrested Sears and

petitioners as they sat in petitioner Bryan's car (S. Tr. 23-24, 393). One of the agents removed the keys from the ignition and handed them to Officer Bergman, who opened the trunk. Inside he saw a briefcase and a locked footlocker (S. Tr. 27-30). The agents immediately opened the briefcase (which contained a large amount of cash),[2] but they decided to obtain a search warrant before opening the footlocker because they "were not sure [they] could break the locks on the foot locker at that time" (S. Tr. 30-31). Both cars were then driven to the Foster City Police Department and impounded.[3] On the following day, after obtaining a warrant to search the automobile (Pet. App. D), the officers opened the footlocker and found some three pounds of cocaine (S. Tr. 31).

ARGUMENT

1. Relying on *United States* v. *Chadwick*, 433 U.S. 1, petitioners contend (Pet. 6-8) that the search of the footlocker in the trunk of the impounded automobile violated the Fourth Amendment. Although petitioners do not dispute that the police officers had probable cause to believe that the footlocker contained cocaine and that the officers had a valid warrant to search the impounded automobile in which the footlocker was resting, they contend that the failure of the warrant to specify the footlocker requires suppression of the cocaine. This claim is insubstantial for a number of reasons.

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[2]Since this money had not been introduced into evidence, the court of appeals did not discuss the validity of the opening of the briefcase (Pet. App. viii n. 2).

[3]A search of petitioners and Sears at the police station revealed that they were in possession of some of the prerecorded money that had been used earlier in the day to purchase one ounce of cocaine from O'Donnell (S. Tr. 32).

To begin with, the court of appeals correctly rejected petitioners' assertion that the search of the footlocker did not occur pursuant to the warrant obtained by the police officers (Pet. App. vii). The warrant authorized the seizure of all contraband from the impounded vehicle (*id.* at xxiii-xxiv), and the police identification list, compiled during the subsequent search, shows that the footlocker containing the cocaine had not been removed from the trunk of petitioner Bryan's car prior to the search (*id.* at vii).

Moreover, regardless of the proper interpretation of the search warrant, the fact remains that the officers could have searched the car without a warrant, either at the time of petitioners' arrest or back at the station house. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 12; *Texas* v. *White*, 423 U.S. 67, 68; *Chambers* v. *Maroney*, 399 U.S. 42, 51-52. This power to execute an immediate search on probable cause extends to items, such as the footlocker, found inside the vehicle. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 23 n. 4 (Blackmun, J., dissenting); *United States* v. *Finnegan*, 568 F. 2d 637, 640 (C.A. 9); *United States* v. *Soriano*, 497 F. 2d 147, 149 (C.A. 5) (*en banc*), certiorari denied *sub nom. Aviles* v. *United States*, 433 U.S. 911.[4]

Finally, even if the warrant were construed not to cover the footlocker and the search of the footlocker were deemed to be inconsistent with the principles announced in *Chadwick*, that decision would not require suppression of the unquestionably probative evidence seized from the trunk of petitioner Bryan's automobile. Every court of

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[4]Indeed, the car and its contents also could have been searched without a warrant because they had lawfully been impounded for forfeiture. See 21 U.S.C. 881; *Cooper* v. *California*, 386 U.S. 58.

appeals to have considered the question has held that *Chadwick* should not be applied to searches, such as the one in this case, that occurred prior to that decision. See *United States* v. *Choate*, C.A. 9, No. 76-3486, decided March 15, 1978; *United States* v. *Berry*, 571 F. 2d 2 (C.A. 7); *United States* v. *Reda*, 563 F. 2d 510 (C.A. 2), certiorari denied, No. 77-5995, April 17, 1978; *United States* v. *Montgomery*, 558 F. 2d 311 (C.A. 5), certiorari denied, No. 77-5025, October 31, 1977. This view is consistent with this Court's repeated statements that Fourth Amendment rulings, which do not relate to the integrity of the fact-finding process, should be accorded only prospective application. See *United States* v. *Peltier*, 422 U.S. 531, 535; *Williams* v. *United States*, 401 U.S. 646.

2. Petitioners argue (Pet. 9-11) that the search warrant was defective because the supporting affidavit omitted the information that a footlocker had been found in the trunk of the car. As noted above, since the officers could have searched the automobile and its contents without a warrant, any defects in the warrant are immaterial. But more important, nothing in the record suggests that the affiant intentionally omitted reference to the footlocker, much less that it was left out with the purpose of influencing the magistrate to issue the warrant. To the contrary, the affidavit sets forth in detail the facts that incontestably establish probable cause to search the car. Inclusion of the omitted information, in the context of O'Donnell's phone calls to "Debbie" and his negotiations with the agents, would only have strengthened that conclusion. Suppression of the cocaine because of the failure to mention the footlocker is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JEROME M. FEIT,
JOHN VOORHEES,
Attorneys.

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